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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

Plaintiff-Respondent,

v.

DANA LYDELL SMITH,

Defendant-Appellant.

No. 42962 & 42963

Minidoka Co. Case No.

CR-2004-2628

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BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF MINIDOKA

HONORABLE RANDY J. STOKER
District Judge

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Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

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STATEMENT OF THE CASE

Nature Of The Case

Dana Lydell Smith appeals from the district court's order denying his most recent Rule 35 motion.

Statement Of The Facts And Course Of The Proceedings

The district court sentenced Smith to a term of 14 years with seven years determinate upon his conviction for grand theft, entering judgment on March 31, 2008. (#35216 R., vol. II, pp. 435-39.) The Idaho Court of Appeals affirmed. State v. Smith, 2009 Unpublished Opinion No. 467, Docket Nos. 35216/35604 (Idaho App. May 20, 2009).

On January 16, 2015, Smith filed a "Motion for Correction or Reduction of Sentence" pursuant to I.C.R. 35. (R., pp. 50-52 (capitalization altered).) Smith claimed his sentence was illegal because the district court had not ordered a psychiatric evaluation for sentencing. (R., p. 51.) The district court denied the motion, reasoning that Smith was claiming to have been sentenced in an illegal manner, which, because the motion was not brought within 120 days, was untimely. (R., pp. 53-54.) Smith filed a notice of appeal timely from the district court's order. (R., pp. 65-67.)

ISSUES

Smith states the issues on appeal as:

1. Is a sentence imposed upon a defendant who has been found to be incompetent to stand trial but never found to have been restored to competency an illegal sentence which can be corrected at any time under I.C.R. 35(a)?
2. Alternatively, did the court err in failing to rule on the motion for appointment of counsel in light of the meritorious motion?

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Has Smith failed to show error in the district court's holding that failure to order a psychiatric evaluation for sentencing is not an issue that can be properly raised or considered in a Rule 35 motion brought after the 120-day deadline has passed?
2. Was Smith not entitled to counsel because the district court lacked jurisdiction?

ARGUMENT

I.

Failure To Order A Psychiatric Evaluation Is Not An Issue That Can Be Properly Raised Or Considered In A Rule 35 Motion Brought Long After The 120-Day Deadline Has Passed

A. Introduction

The district court concluded that Smith's claim that the court erred by not ordering a psychiatric evaluation for sentencing was a claim that his sentence had been imposed in an illegal manner, and was therefore untimely because not brought within 120 days as required by I.C.R. 35(b). (R., pp. 53-54.) Smith argues that his competency at sentencing "is not a claim that the sentence was imposed in an illegal manner" but is instead a challenge to "the court's power to impose a sentence at all" and that "the illegality of the sentence is apparent from the face of the record." (Appellant's brief, p. 6.) Review shows Smith's argument is without merit.

B. Standard Of Review

Whether a sentence is illegal or was imposed in an illegal manner is question of free review. State v. Adamcik, 152 Idaho 445, 485, 272 P.3d 417, 457 (2012).

C. The District Court's Allegedly Erroneous Failure To Order A Psychiatric Evaluation For Sentencing Did Not Render The Sentence Illegal

A motion to correct a sentence that was imposed in an illegal manner "must be filed within 120 days of the entry of the judgment imposing sentence." I.C.R. 35(b). The 120-day filing limit of Rule 35(b) is jurisdictional, and therefore

the district court lacks jurisdiction to consider an untimely Rule 35(b) motion. See State v. Sutton, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987); State v. Fox, 122 Idaho 550, 835 P.2d 1361 (Ct. App. 1992) (“The filing deadlines described in [Rule 35] create a jurisdictional limitation on the authority of the trial court to entertain motions under the rule. Without a timely filing, the court cannot consider the motion.” (internal citations omitted)).

In contrast to the jurisdictional time limit imposed upon a claim the sentence was imposed in an illegal manner, a district court “may correct a sentence that is illegal from the face of the record at any time.” I.C.R. 35(a). This language, however, is “narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing.” State v. Clements, 148 Idaho 82, 86, 218 P.3d 1143, 1147 (2009).

In this case Smith was sentenced to 14 years with seven years determinate upon his conviction for grand theft, a facially legal sentence. I.C. § 18-2408(2)(a) (grand theft punishable by up to 14 years in prison). He moved for a reduction of his sentence from 14 years to eight years because he was “mentally incompetent and was tried, convicted, sentence[d] and convicted [sic] while Defendant was incompetent” making his mental health a “factor” at sentencing. (R., pp. 51-52 (capitalization altered).) Specifically, he claimed his sentence was “illegal as there was no psychiatric exam as per I.C. § 19-2522” and the judge “struck” the mitigating mental health evidence. (Id.) Because the sentence is facially legal and the only illegality claimed—that the district court did

not order a psychiatric evaluation for sentencing—went only to the allegedly illegal manner in which the sentence was imposed, the district court correctly concluded it lacked jurisdiction over the motion.

On appeal Smith's counsel argues that his sentence was illegal because the "record plainly shows that Mr. Smith was found to be incompetent and the trial court never found he had been restored to competency" and therefore the district court was legally "barred ... from sentencing him." (Appellant's brief, p. 7.) Besides being a different claim than raised below, this argument is based on a false assertion. Nowhere in the record is there any finding that Smith was incompetent.

There is in the record *evidence* relevant to Smith's competency. Attached to the PSI are several psychological evaluations. Dr. Smith's May 2, 2007, evaluation reports that Smith can "understand the proceedings against him," the "roles of the various players in the court process," and "the possible consequences he is facing." (Smith Evaluation, p. 8 (attached to #35216 PSI).) However, Smith's "ability to assist in his own defense presents a question" because his tendency to "ramble off rather inappropriately ... likely seriously impairs his ability to work systematically with his attorney in a sustained fashion." (Id.) However, once the proper medications "become effective" Smith "could in all likelihood proceed with matters in court." (Id.) According to a subsequent mental health report, prepared on November 8, 2007, and also attached to the PSI, Smith does not suffer from a "major mental illness," but rather a "personality disorder" that causes Smith to "act out" if he does not get what he wants.

(Mental Health Report (attached to #35216 PSI).) There is no “finding” that Smith was incompetent to proceed to sentencing on March 31, 2008. (See #35216 R., p. 435 (sentencing was held on 3/31/08).) At best such a “finding” could be made only after an evidentiary hearing, held either before sentencing or in response to the Rule 35 motion. Smith’s appellate counsel’s claim that there was a “finding” he was incompetent is false and misleading.

Even if not premised on a false assertion, Smith’s argument would still be without merit. The Idaho Code prohibits sentencing a mentally incompetent person “so long as such incapacity endures,” I.C. § 18-210, and also establishes a detailed procedure for determining such incapacity and its duration, I.C. §§ 18-211, 18-212, 18-215. Under this procedure the question of competency “shall be determined by the court,” and if the court finds the defendant incompetent to proceed it must generally suspend the proceedings. I.C. § 18-212(1) and (2). To the extent Smith claims the trial court erred by finding him competent; making no finding on his competency; or by failing to suspend the proceedings until he was determined to be competent, such are claims the sentence was imposed in an illegal manner. Indeed, if such error were demonstrated by a timely Rule 35 motion or on appeal, there is nothing in the law that would prohibit imposition of the exact same sentence upon Smith once he is determined to be competent. It is not the sentence that Smith claims on appeal to be illegal, only the manner by which it was imposed upon him.

Because the claim in Smith's motion (and his appellate re-characterization of that claim) is not a claim that the sentence is illegal on the face of the record, the district court properly concluded it lacked jurisdiction to consider it.

II.

The District Court Did Not Err By Not Appointing Counsel Because It Lacked Jurisdiction Over The Case

A. Introduction

Smith claims the district court erred by not appointing counsel to represent him on his Rule 35 motion. (Appellant's brief, pp. 9-11.) Because the district court lacked jurisdiction, Smith has failed to show reversible error.

B. Standard Of Review

Denial of court appointed counsel under I.C. § 19-852(b)(3) is "within the court's discretion" as long as "the court appropriately finds that the claims presented are frivolous." Swisher v. State, 129 Idaho 467, 468-69, 926 P.2d 1314, 1315-16 (Ct. App. 1996) (addressing appointment of counsel in post-conviction proceedings).

C. Smith Was Not Entitled To Counsel Because The District Court Lacked Jurisdiction

A criminal defendant has the statutory right to counsel at all stages of the criminal process, including pursuit of a Rule 35 motion. Murray v. State, 121 Idaho 918, 923 n.3, 828 P.2d 1323, 1328 n.3 (Ct. App. 1992). However, the trial court may deny appointment of counsel if the Rule 35 motion is frivolous or one that a reasonable person with adequate means would not be willing to bring at

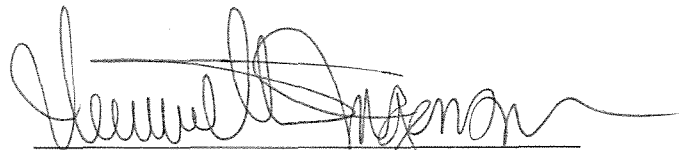
his or her own expense. I.C. § 19-852(b)(3). A determination of whether a motion for reduction of sentence is frivolous for purposes of applying I.C. § 19-852(b)(3) is based on the contents of the motion itself and any accompanying documentation that may support the motion. State v. Wade, 125 Idaho 522, 525, 873 P.2d 167, 270 (Ct. App. 1994). Thus, a district court is within its discretion to deny a request for court appointed counsel under I.C. § 19-852(b)(3) if it appropriately finds, after reviewing the contents of the motion, that the claims presented are frivolous. Swisher, 129 Idaho at 468-69, 926 P.2d at 1315-16.

As shown above, the district court lacked jurisdiction to consider the motion. Because the court lacked jurisdiction, it also lacked jurisdiction to appoint counsel for Smith to pursue his motion. Smith has shown no error.¹

CONCLUSION

The state respectfully requests this Court to affirm the district court's denial of Smith's Rule 35 motion.

DATED this 5th day of January, 2016.



KENNETH K. JORGENSEN
Deputy Attorney General

¹ Because the district court lacked jurisdiction over the Rule 35 motion, even if the district court had jurisdiction to consider the motion for appointment of counsel any failure to rule on it was also necessarily harmless. Swisher v. State, 129 Idaho 467, 470-471, 926 P.2d 1314, 1317-1318 (Ct. App. 1996) (district court's failure to consider motion for appointed counsel before dismissing post-conviction action was harmless error because Swisher's claims were time-barred, and therefore frivolous).

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of January, 2016, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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